(1)

Supreme Court, U.S.
FILED
06-56 JUL 13 2006
OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States

October Term, 2006

CHRISTOPHER E. PARKER,
PRIVATE, UNITED STATES MARINE CORPS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

ROLANDO R. SANCHEZ
Captain, U. S. Marine Corps.
Navy-Marine Corps Appellate
Review Activity
716 Sicard St., S.E., Suite 1000
Washington, D.C. 20374
(202) 685-7390

Counsel of Record

QUESTION PRESENTED FOR REVIEW

When a military service member exercises his right to appeal under Article 67(a)(3), Uniform Code of Military Justice, can the Court of Appeals for the Armed Forces grant review of the appealed issue pursuant to the statute, but then, using an exception to the "law of the case" doctrine, review a different issue that was never appealed per the statute, and that is detrimental and undermines that service member's appeal?

TABLE OF CONTENTS

Question Presented for Review i

Table of Authorities iii

Opinions and Orders Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 4

Reasons for Granting the Petition 7

Conclusion 12

Appendix A 1*a*

Appendix B 33*a*

Appendix C 34*a*

TABLE OF AUTHORITIES

United States Supreme Court Cases

Clinton v Goldsmith,
526 U.S. 529 (1999) 7,10
Santobello v. New York,
404 U.S. 257 (1971) 11
United States v. United States Smelting, Refining & Mining Co.,
339 U.S. 186 (1950) 9

Court of Appeals for the Armed Forces Cases

United States v. Dean,
23 C.M.R. 185 (C.M.A. 1957) 11
United States v. Grooters,
39 M.J. 269 (C.M.A. 1994) 9
United States v. Smith,
39 M.J. 448 (C.M.A. 1994) 11

United States Constitution

U.S. Const , Art. I, § 8 2
U.S. Const., amend VI 2

Federal Statutes

10 U.S.C. § 866 (2000) 2,5
10 U.S.C. § 867 (2000) ..... *passim*
10 U.S.C. § 886 (2000) 4
10 U.S.C. § 887 (2000) 4
10 U.S.C. § 953 (2000) 12

28 U.S.C. § 1259(3) (2000)..... 2
28 U.S.C. § 1651(a) (2000)..... 10

Law Review Article

Scott Doney, *Law of the Case in Nevada: Confusing Relatives*, 2 NEV. L.J. 675 (2002).....9

In The

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER E. PARKER,
PRIVATE, UNITED STATES MARINE CORPS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

Private Christopher E. Parker, United States Marine Corps, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Armed Forces is published at 62 M.J. 459 (C.A.A.F. 2006). App. A, *infra*, at 1*a*. The order of the United States Court of Appeals for the Armed Forces denying Petitioner's Petition for Reconsideration is located at

United States v. Parker, 62 M.J. 459 (C.A.A.F. 2006). App. B, *infra*, at 33*a*. The opinion of the Navy-Marine Corps Court of Criminal Appeals is at 60 M.J. 666 (N-M.Ct. Crim. App. 2004). App. C, *infra*, at 34*a*.

JURISDICTION

The lower court granted review of Petitioner's case and affirmed his conviction on March 14, 2006. That court denied Petitioner's timely motion for reconsideration on April 14, 2006. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1259(3). Petitioner invoked the jurisdiction of the Court of Appeals for the Armed Forces under Article 67(a)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(3). The Navy-Marine Corps Court of Criminal Appeals had jurisdiction over this case pursuant to Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portion of Art. I, § 8 reads:

> The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces.

U.S. Const., amend VI, reads, in part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory

process for obtaining witnesses in his favor; and to h[illegible] the Assistance of Counsel for his defence.

Article 67(a), UCMJ, 10 U.S.C. § 867(a), reads:

> (a) The Court of Appeals for the Armed Forces shall review the record in –
>
> (1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;
>
> (2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and
>
> (3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

Article 67(c), UCMJ, 10 U.S.C. § 867(c) reads, in part:

> In a case reviewed upon petition of the accused . . . action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

STATEMENT OF THE CASE

Petitioner was charged with unauthorized absence and missing movement by design in violation of Articles 86 and 87, UCMJ, 10 U.S.C. §§ 886, 887. At a special court-martial composed of a military judge sitting alone, Petitioner, pursuant to a pre-trial agreement that limited his confinement to thirty days and suspended any adjudged punitive discharge, agreed to plead guilty to unauthorized absence and missing movement through neglect.

Consistent with his pre-trial agreement Petitioner pled guilty to the charges. After a providence inquiry, the military judge accepted the plea to the unauthorized absence charge, but determined that the plea to the missing movement charge was improvident because Petitioner could not confirm that he received official notification that his unit was going to deploy to Japan.

Consequently, the commanding officer who convened Petitioner's court-martial (the convening authority) withdrew from the pre-trial agreement and Petitioner was forced to contest the missing movement charge. After considering evidence from both parties, the military judge found Petitioner guilty of missing movement by design. Pursuant to Petitioner's earlier plea, which Petitioner elected not to change, the military judge also found Petitioner guilty of unauthorized absence. The military judge sentenced Petitioner to confinement for five months and a bad-conduct discharge from the United States Marine Corps. The convening authority, approved the sentence, but remitted confinement in excess of forty-four days.

On automatic appeal under Article 66, UCMJ, 10 U.S.C. § 866, the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) held that the military judge committed an error when he found that Petitioner was improvident to his plea to missing movement by neglect. In order to reflect the pre-trial agreement, the court reduced the finding of missing movement through design to missing movement through neglect, and affirmed only thirty days confinement. But it approved the bad-conduct discharge. *United States v. Parker*, 60 M.J. 666 (N-M. Ct. Crim. App. 2004). The NMCCA refused to fully enforce the pretrial agreement that Petitioner had detrimentally relied upon to plead guilty because, at sentencing and in a post-trial letter to the convening authority, Petitioner expressed that he wanted his punitive discharge approved. *Id.* at 670.

Petitioner exercised his right to appeal to the Court of Appeals for the Armed Forces (CAAF) under Article 67, UCMJ, 10 U.S.C. § 867. The CAAF, which has discretionary review powers, granted review of Petitioner's case on the following issue:

> WHETHER THE LOWER COURT ERRED WHEN IT REFUSED TO ENFORCE THE PRETRIAL AGREEMENT'S PROVISION TO SUSPEND THE BAD-CONDUCT DISCHARGE.

After the issue had been briefed and orally argued, a divided CAAF decided Petitioner's case, but on an issue that had never been properly raised. In its opinion, citing an exception to the "law of the case" doctrine, the CAAF circumvented the issue that it granted per Petitioner's appeal under Article 67, UCMJ. Instead,

the CAAF opted to review whether the military judge had erroneously found Petitioner improvident – an issue that was never appealed. *United States v. Parker*, 62 M.J. 459, 464-65 (C.A.A.F. 2006). The CAAF then found that its lower court's decision was "clearly erroneous" and that it could not adhere to the "law of the case" doctrine because not correcting the clear error would create a "manifest injustice" in Petitioner's case. *Id.* at 465-66.

Ultimately, although it found part of the NMCCA's holding clearly erroneous, and never decided on the granted issue, the CAAF affirmed the decision of the NMCCA. *Id.* at 466.

Two of the five members of the CAAF, Chief Judge Gierke and Judge Erdmann, dissented from the court's opinion because the "law of the case" doctrine was misapplied. Judge Erdmann, writing for the dissent, stated that Petitioner was ultimately found guilty on almost the same evidence that the military judge heard during the providence inquiry. *Id.* at 468 (Erdmann, J., dissenting). And he stated that Petitioner's case, if the pre-trial agreement was enforced, would not present a "manifest injustice" because the pre-trial agreement was a position that both parties had originally agreed upon, and the Government had consciously chosen not to appeal the lower court's decision. *Id.* at 468-69. The dissent would have also reinstated the pre-trial agreement whereby the bad-conduct discharge would be suspended. *Id.* at 469.

REASONS FOR GRANTING THE PETITION

There are compelling reasons to grant review of this Petition because the CAAF has overstepped its jurisdictional bounds in a manner that was unintended by Congress, and which is detrimental to the appellate rights of U.S. military service members.

Congress, in the exercise of its power to govern and regulate the Armed Forces, created the CAAF and set limits to its jurisdiction. *See* U.S. Const. Art I, § 8, cl. 14; *Clinton v. Goldsmith*, 526 U.S. 529 (1999).

Article 67(a), UCMJ, reads:

> (a) The Court of Appeals for the Armed Forces shall review the record in –
>
> (1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;
>
> (2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and
>
> (3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

Therefore, jurisdictionally, with the exception of capital cases, the CAAF is given discretionary review of a service member's appeal. But it must grant non-

discretionary review to cases that the Government, via the Judge Advocate General, orders reviewed.

Additionally, Congress has limited the scope of the CAAF's jurisdictional power to act. Article 67(c), UCMJ reads, in part:

> In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

Within these parameters, Petitioner filed his appeal to the CAAF by exercising his right to appeal under Article 67, UCMJ. And the CAAF granted review of Petitioner's raised issue. Yet, the CAAF did not take "action" on the issue "specified in the grant of review." Art. 67(c), UCMJ. The CAAF relied upon an exception to the "law of the case" doctrine to formulate its own issue to review. *Parker*, 62 M.J. at 464-66.

Petitioner presents two compelling reasons why the U.S. Supreme Court should grant a writ of certiorari. First, because an exception to the "law of the case" doctrine cannot empower the CAAF to circumvent limits that Congress has placed upon its review powers. Second, because a service member's appeal to the CAAF is intended to be for his benefit and should not put him in a worse position for having exercised his right under Article 67, UCMJ.

1. Article 67, UCMJ, cannot be superseded by a "law of the case" doctrine exception.

"Law of the case" belongs to the family of preclusion doctrines that includes *stare decisis*, collateral estoppel and *res judicata*. *See* Scott Doney, *Law of the Case in Nevada: Confusing Relatives*, 2 NEV. L.J. 675 (2002). It is an efficiency doctrine that renders complete a matter that has been litigated and decided. *See United States v. United States Smelting, Refining & Mining Co.*, 339 U.S. 186, 198 (1950). The CAAF has applied "law of the case" where if an adversely affected party in a decision has not appealed, "that decision is binding for purposes of subsequent proceedings in that case." *United States v. Grooters*, 39 M.J. 269, 272-73 (C.M.A. 1994).

At the oral argument in Petitioner's case, the government admitted that it "made a conscious decision not to appeal" the NMCCA's adverse decision that the military judge committed error. *Parker*, 62 M.J. at 468 (Erdmann, J., dissenting). Consequently, the "law of the case" doctrine applied. When Petitioner exercised his appellate right under Article 67(a), UCMJ, and the CAAF granted the issue that he appealed, the process also bound the CAAF to review only the issue that Petitioner raised.

Instead the CAAF articulated an exception to the "law of the case" doctrine, where if its lower court committed clear error and there was a manifest injustice, a previously settled issue could be revisited. *Parker*, 62 M.J. at 465. The CAAF applied the exception to Petitioner's case, but it failed to explain how the

exception surmounted its narrow review authority that Congress has allowed under Article 67(a), UCMJ.

This Court has previously held that the CAAF's jurisdiction is limited to the jurisdiction that Congress legislated under Article 67, UCMJ. *Goldsmith*, 526 U.S. at 534. In *Goldsmith*, the CAAF reviewed an issue that went beyond the scope of that statute, and had interpreted the All Writs Act, 28 U.S.C. § 1651(a), as a means of exercising that greater jurisdiction. This Court reversed the CAAF because it acted outside of the parameters of Article 67, UCMJ. *Goldsmith*, 526 U.S. at 534-35.

Now, the CAAF is again interpreting its jurisdiction beyond the parameters of Article 67, UCMJ. It has relied upon an exception to the "law of the case" doctrine to justify reviewing an issue that it would never otherwise be able to review.

2. The CAAF has used Petitioner's appeal under Article 67, UCMJ, to his detriment.

The ultimate effect of Petitioner's appeal is that it worked to his detriment because the issue that he appealed, and that the CAAF granted, was never reviewed. The CAAF ultimately ruled against him on an issue that was never raised pursuant to Article 67, UCMJ. *Parker*, 62 M.J. at 466.

Article 67(a)(3) specifically confers on a military service member a right to petition his case to the CAAF for review, and places a burden on him to show "good cause" for a grant of review. The nature of Article 67(a)(3), UCMJ, leaves no question that it is meant for

the benefit, not the detriment, of a military service member. The CAAF has previously recognized that "powers of appellate review in the military justice system generally were designed to benefit an accused, not to prejudice him by leading to a more serious conviction or a more severe sentence." *United States v. Smith*, 39 M.J. 448, 451 (C.M.A. 1994). Essentially, the CAAF has followed a rule that a service member cannot be left in a worse position than when he first appealed. *See United States v. Dean*, 23 C.M.R. 185 (C.M.A. 1957).

Petitioner showed "good cause" and his issue for review was granted. Petitioner presented a constitutional issue to the CAAF by raising the question of whether his pre-trial agreement should be enforced after he had detrimentally relied upon it. *See Santobello v. New York*, 404 U.S. 257 (1971). But this constitutional issue was never resolved by the CAAF. Instead, the CAAF was diverted by what it saw to be a clear error and manifest injustice regarding a different issue that was never raised under Article 67, UCMJ. Although it was Petitioner's appeal, the manifest injustice that the CAAF identified affected the Government – and the Government had never cared to certify it for mandatory review pursuant to its powers under Article 67(a)(2), UCMJ. *Parker*, 62 M.J. at 465. In this case, Judge Erdmann wrote in his dissent that manifest injustice requires a heavy burden and "can only be proven in the most unusual of cases." *Id.* at 468 (Erdmann, J., dissenting)(footnote omitted). The Government never appealed or met a burden on the issue. Ironically, the only burden met in Petitioner's case

was his burden to show "good cause" on why his issue should be granted. Article 67(a)(3), UCMJ.

After having complied with the "good cause" requirement of Article 67(a)(3), UCMJ, the end result of Petitioner's appeal to the CAAF was a decision that used his appeal to his detriment. Petitioner is now left in a worse position because the one aspect of the NMCCA's decision that helped him, that the military judge had erred, has now been taken away. For example, Petitioner cannot petition the Navy Clemency and Parole Board with a clemency argument that the military judge's error, and its resulting effect on the pre-trial agreement, should allow for an upgraded discharge. *See* 10 U.S.C. § 953.

CONCLUSION

Wherefore, the Petitioner respectfully requests that the Supreme Court grant his petition, and either summarily reverse or set the case for full briefing and oral argument.

Respectfully submitted,

ROLANDO R. SANCHEZ
Captain, United States Marine Corps
U.S. Navy-Marine Corps
Appellate Review Activity
716 Sicard Street, S.E., Suite 1000
Washington Navy Yard, D.C. 20374
(202) 685-7390
Counsel of Record

Appendix A

UNITED STATES, Appellee v. Christopher E. PARKER, Private U.S. Marine Corps, Appellant

No. 05-0072

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

62 M.J. 459; 2006 CAAF LEXIS 291

October 11, 2005, Argued
March 14, 2006, Decided

For Appellant: Captain Rolando R. Sanchez, USMC (argued).

For Appellee: Lieutenant TyQuili R. Booker, JAGC, USN (argued); Commander Charles N. Purnell, JAGC, USN, and Major Kevin C. Harris, USMC (on brief); Colonel William K. Lietzau, USMC.

Judges: EFFRON, J., delivered the opinion of the Court, in which CRAWFORD and BAKER, JJ., joined. ERDMANN, J., filed a dissenting opinion, in which GIERKE, C.J., joined.

PER CURIAM:

Judge EFFRON delivered the opinion of the Court.

Appellant was charged with unauthorized absence and missing movement by design in violation of Articles 86 and 87, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 886, 887 (2000). At a special court-martial composed of a military judge sitting alone, Appellant entered pleas of guilty to unauthorized absence and missing movement by neglect. The military judge accepted the plea to the unauthorized absence charge, but he determined that the plea to the missing movement charge was improvident. Appellant subsequently contested the missing movement charge. After considering evidence from both parties, the military judge found Appellant guilty of missing movement by design. Pursuant to Appellant's earlier plea, the military judge also found Appellant guilty of unauthorized absence. In the findings, the military judge made minor modifications that are not pertinent to the present appeal. The military judge sentenced Appellant to a bad-conduct discharge and confinement for five months.

The convening authority approved the sentence and remitted confinement in excess of forty-four days. The United States Navy-Marine Corps Court of Criminal Appeals affirmed the finding of unauthorized absence, reduced the finding of missing movement through design to missing movement through neglect, and affirmed a sentence of a bad-

conduct discharge and thirty days of confinement. *United States v. Parker*, 60 M.J. 666 (N-M. Ct. Crim. App. 2004).

On appellant's petition, we granted review of the following issue:

> WHETHER THE LOWER COURT ERRED WHEN IT REFUSED TO ENFORCE THE PRETRIAL AGREEMENT'S PROVISION TO SUSPEND THE BAD-CONDUCT DISCHARGE.

For the reasons discussed below, we affirm.

I. BACKGROUND

A. PLEA INQUIRIES AND PRETRIAL AGREEMENTS

Under *United States v. Care*, 18 C.M.A. 535, 541, 40 C.M.R. 247, 253 (1969), and its progeny, there are specific requirements governing guilty pleas in the military justice system. Prior to accepting a guilty plea, the military judge must provide detailed advice to the accused and ensure that the accused understands the meaning and effect of the plea. Rule for Courts-Martial (R.C.M.) 910(c). The military judge may not accept a plea of guilty without addressing the accused personally and determining that the plea is voluntary. R.C.M. 910(d). In addition, the military judge may not accept a plea of guilty

without questioning the accused and ensuring that there is a factual basis for the plea. Id. As noted in the R.C.M. 910(d) Discussion, "the accused must admit every element of the offense(s) to which the accused pleaded guilty." The R.C.M. 910(d) Discussion also states: "The accused need not describe from personal recollection all the circumstances necessary to establish a factual basis for the plea. Nevertheless the accused must be convinced of, and be able to describe all the facts necessary to establish guilt." The decision of a military judge to reject a guilty plea will not be overturned unless it is arbitrary. *United States v. Penister*, 25 M.J. 148, 152 (C.M.A. 1987) ("A judge may err on the side of caution and not accept a guilty plea when there is any question as to its providence.").

An accused and the convening authority may enter into a pretrial agreement, subject to R.C.M. 705. Under the rule, for example, an accused may agree to plead guilty to one or more charges and specifications, and the convening authority may agree to limit, suspend, or mitigate all or portions of the sentence. See, e.g., R.C.M. 705(b)(1); R.C.M. 705(b)(2)(E); R.C.M. 705(b)(2)(E) Discussion. When there is a plea agreement, the military judge must ensure that the accused understands the agreement, that any unclear terms are clarified, and that all parties agree to the terms of the agreement. R.C.M. 910(f); R.C.M. 910(h)(3); R.C.M. 910(f)(4) Discussion.

An accused may withdraw from a pretrial agreement at any time, subject to the rules governing guilty pleas and confessional stipulations. See R.C.M. 705(d)(4)(A). After trial, and prior to the convening authority's action, the accused may initiate a modification of the pretrial agreement, so long as the accused has the assistance of counsel, the modification is the product of a fully informed and considered decision, and it is not the product of a coercive atmosphere. *United States v. Pilkington*, 51 M.J. 415, 416 (C.A.A.F. 1999).

The convening authority may withdraw from a pretrial agreement under four specified circumstances: (1) "at any time before the accused begins performance of promises contained in the agreement"; (2) "upon the failure by the accused to fulfill any material promise or condition in the agreement"; (3) "when inquiry by the military judge discloses a disagreement as to a material term in the agreement"; and (4) "if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review." R.C.M. 705(d)(4)(B).

B. THE PRETRIAL AGREEMENT BETWEEN APPELLANT AND THE CONVENING AUTHORITY

The charged offenses involved two related matters: (1) Appellant's unauthorized absence of 134 days; and (2) Appellant's missing the deployment of his

unit to Okinawa by "design" on a specified day within that period. Appellant and the convening authority entered into a pretrial agreement that expressly provided that "all provisions of this Agreement are material." Appellant agreed to plead guilty to the charged unauthorized absence and to a lesser offense of missing movement through neglect. In return, the convening authority agreed to: (1) suspend a bad-conduct discharge, if adjudged; and (2) suspend any confinement in excess of thirty days, if adjudged. In the agreement, Appellant expressly stated: "I understand that if my guilty pleas do not remain in effect for any reason through the announcement of the sentence, then the convening authority may withdraw from this Agreement."

C. THE PROVIDENCE INQUIRY

Consistent with the pretrial agreement, Appellant entered pleas of guilty at trial to the unauthorized absence charge and to the offense of missing movement by neglect. The military judge explained the plea inquiry process to Appellant, specifically noting: "If at any time you become confused or have any questions, stop me and I'll give you the opportunity to consult with your attorney."

The military judge conducted an inquiry into the providence of the pleas, ultimately concluding that Appellant's plea was provident as to the unauthorized absence offense. The inquiry into unauthorized absence and Appellant's conviction for that offense

are not at issue in the present appeal.

With respect to missing movement by neglect, the military judge provided the following description of the elements:

> Number one, that you were required in the course of duty to move with 3d Battalion, 11th Marines, 1st Marine Division.
>
> The second element is that you knew of the prospective movement of the unit.
>
> The third element is that on or about the 7th of August 2000, at Marine Air Ground Task Force Training Command, Twentynine Palms, California, you missed the movement of that unit.
>
> And the fourth element is that you missed the movement through neglect.

See Manual for Courts-Martial, United States pt. IV, para. 11.b (2005 ed.).

In addition, the military judge offered the following explanation of certain terms used in the elements:

> The word "movement" as used in this specification means a major transfer of a unit involving a substantial distance and period of time. The word does not

include practice marches of a short duration and distance, nor minor changes in the location of a unit.

In order to plead guilty to this offense, you must have actually known of the prospective movement that was missed. Knowledge of the exact hour, even the exact date of the scheduled movement is not required. It is sufficient if the approximate date was known by you as long as there is a causal connection between your conduct and the missing of the scheduled movement.

The "term neglect" [sic] means the omission to take such measures as are appropriate under the circumstances to assure presence with an aircraft, unit, or ship at the time of the scheduled movement, or doing some act without giving attention to its probable consequences in connection with the prospective movement to such a distance as would make it likely that the one could not return in time for the movement.

See *Id.* para. 11.c.

Appellant responded affirmatively to the military judge's general inquiry as to whether the elements

described what he "did on that occasion." In response to the military judge's question about knowledge of the movement, Appellant acknowledged that he had heard from his superior noncommissioned officers that the unit was going to Okinawa in early August 2000. The military judge then sought to determine whether the impending movement was the subject of official orders communicated to Appellant or whether he had simply heard barracks rumors:

> MJ: And you knew of the movement, the place and time because your NCOs [noncommissioned officers] had told you, and that was also common knowledge in the battalion?
>
> ACC: No, sir. I heard it through--they were talking about it, sir. I just over heard [sic] it, sir.
>
> MJ: Well, how did you know they were accurate? Lots of people talk about stuff all the time and never--so you just heard some rumors that you all might be going to Okinawa?
>
> ACC: Yes, sir.

Following Appellant's acknowledgement that his knowledge of a possible deployment was the result of "rumors," the military judge stated: "Okay. I'm not going to take his plea." After a brief, thirteen-minute

recess, the military judge asked if defense counsel needed additional time in order to consult with Appellant. Defense counsel then requested a continuance, which the military judge granted. Defense counsel offered no objection to the military judge's plea inquiry or his decision to not accept the plea.

During the continuance, Appellant attempted to enter into a new pretrial agreement with the convening authority based upon the unauthorized absence charge, but the convening authority declined to do so. When the court-martial convened a month later, the defense did not ask the military judge to reopen the providence inquiry, nor did the defense otherwise challenge the military judge's ruling on providence. In response to the military judge's inquiry about motions, the defense replied that he had none.

The military judge asked Appellant whether he understood that the convening authority was no longer bound by the plea agreement in view of the prior rejection of the plea. Appellant responded in the affirmative. After noting that Appellant's request for a bench trial was based, at least in part, on the pretrial agreement that was no longer in effect, the military judge offered Appellant the opportunity to revisit his forum choice. Appellant reaffirmed his desire for a judge-alone proceeding.

D. MISSING MOVEMENT -- THE CONTESTED CHARGE

The military judge obtained the agreement of both parties that Appellant's provident plea to the absence offense would establish one of the four elements of missing movement--that he was not present when his unit deployed. The military judge emphasized that the Government would bear the burden of proving the remaining elements--that he was required to move with his unit, that he knew of the prospective movement, and that he missed the movement by design or neglect.

Trial on the merits focused primarily on the same concerns that had been raised in the providence inquiry regarding Appellant's awareness of a deployment order. The prosecution introduced the testimony of personnel in Appellant's chain of command who described the information regarding deployment to Okinawa that was conveyed to the unit, as well as evidence that Appellant was present for at least some of those briefings.

Defense counsel, in his opening statement, expressly set forth the defense position--that Appellant "did not have actual knowledge that the unit was deploying to Okinawa in August." Appellant, who was the primary witness in his own behalf, testified that he had no recollection of being advised of a deployment to Okinawa. He specifically denied that anyone in an official capacity had communicated to him that the unit was going to Okinawa, including the

prosecution's witnesses from his chain of command.

Defense counsel, in his closing statement, contended that the discussions within the unit amounted to nothing more than general information about potential deployments, and that Appellant "did not have actual knowledge" of a specific deployment. The prosecution argued in rebuttal that the military judge, as factfinder, could infer actual knowledge from circumstantial evidence, particularly the information that had been made available to the unit. After making minor changes in the wording of the charges, the military judge entered findings of guilty to the contested charge of missing movement by design, and of the uncontested charge of unauthorized absence.

E. SENTENCING -- APPELLANT'S FIRST REQUEST FOR A BAD-CONDUCT DISCHARGE

During the sentencing proceedings, Appellant made a brief unsworn statement in which he recounted his problems in high school and in the service. After acknowledging his problems, he said: "I kept on getting in trouble no matter how hard I tried. So I took it into my own hands and went UA [unauthorized absence]." Appellant expressly requested a punitive discharge: "I'm sorry for the trouble I have caused and respectfully request a bad-conduct discharge." He concluded his statement by noting: "My attorney has advised me of the negative aspects of a bad-conduct discharge; however, I still

request it. Thank you." See United States v. Pineda, 54 M.J. 298, 300-01 (C.A.A.F. 2001) (setting forth procedural requirements when an accused requests a punitive discharge).

The prosecution made a very brief sentencing argument, recommending a bad-conduct discharge and "an appropriate amount of confinement." Defense counsel noted Appellant's request for a bad-conduct discharge, pointed out that the missing movement offense took place during the period of unauthorized absence, and asked the military judge to limit confinement to thirty days. The military judge sentenced Appellant to confinement for five months and a bad-conduct discharge.

F. APPELLANT'S SECOND REQUEST, SPECIFICALLY ASKING THE CONVENING AUTHORITY TO NOT SUSPEND THE BAD-CONDUCT DISCHARGE

Subsequent to trial, defense counsel submitted a request for clemency to the convening authority under R.C.M. 1105. The request began by reminding the convening authority that Appellant "went to court with a pretrial agreement that stated that in return for his pleas of Guilty ... you agreed to suspend any discharge and any confinement in excess of 30 days." Defense counsel emphasized that the plea had been rejected because Appellant fulfilled his obligation to the truth during the providence inquiry:

> The Military Judge would not accept a

> guilty plea to the missing movement charge because Pvt [Private] Parker stated that although it was common knowledge that the unit was going to Okinawa that summer, he couldn't recall ever specifically being told that by someone in an official capacity. Pvt Parker wanted to plead guilty, but based on his memory and what he could honestly testify to the judge would not accept his plea.

After recounting the results of trial, defense counsel urged the convening authority to use the pretrial agreement as the framework for post-trial action with respect to confinement:

> It is requested that you suspend any confinement in excess of 30 days. The Defense requests that when considering this request for clemency that you take into account that this was one of the terms agreed to in the original agreement. Although you decided to withdraw from the agreement when a guilty finding was not entered for the missing movement charge, the defense urges you to consider that Pvt Parker attempted to plead guilty to this charge and that it was the military judge that refused to accept the plea.

With respect to the bad-conduct discharge, however, defense counsel implored the convening authority to

disregard his prior agreement to suspend the punitive discharge, emphasizing with capital letters that his client "does NOT desire his Bad Conduct Discharge be suspended."

The convening authority responded to the defense request by ordering Appellant's release from confinement even though the case had not yet been presented to him for action. As a result, Appellant's sentence to confinement was reduced from the five months adjudged at trial to forty-four days.

G. APPELLANT'S THIRD REQUEST, REITERATING HIS OPPOSITION TO SUSPENSION OF THE BAD-CONDUCT DISCHARGE

Prior to the convening authority's formal action on the findings and sentence, the defense made a further submission to the convening authority. After noting that the defense had previously submitted a clemency request, defense counsel reiterated Appellant's opposition to suspension of the adjudged discharge:

> Since Pvt Parker was released prior to the end of his sentence and he does NOT desire that his Bad Conduct Discharge be suspended, the defense has no request for clemency.

In accordance with Appellant's post-trial submissions, the convening authority approved a sentence that included the modified period of confinement and an unsuspended bad-conduct discharge.

H. REVIEW BY THE COURT OF CRIMINAL APPEALS

The Court of Criminal Appeals held that the military judge should have accepted Appellant's plea in its entirety, on the grounds that Appellant articulated sufficient facts to support a plea of guilty to missing movement by neglect. *Parker*, 60 M.J. at 669. The court substituted a finding of missing movement by neglect in lieu of the finding of missing movement by design. *Id.* at 671. The court further held that the pretrial agreement should have remained in effect, and it reduced Appellant's confinement from forty-four days to thirty days to reflect the terms of the agreement. *Id.* at 669 (citing *Penister*, 25 M.J. at 153). Based upon Appellant's multiple requests for an unsuspended bad-conduct discharge, the court concluded that the portion of the pretrial agreement regarding suspending the bad-conduct discharge was no longer in effect, and declined to provide further relief. *Id.* at 670.

II. DISCUSSION

Appellant contends in the present appeal that his discharge should be suspended in accordance with the original pretrial agreement. We note that the Government has not appealed the ruling of the court below with respect to either the modification of the findings to conform with Appellant's plea, or the revision of the confinement portion of the sentence to conform with the pretrial agreement. When a party does not appeal a ruling, the ruling of the lower court

normally becomes the law of the case. See *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002). The law-of-the-case doctrine, however, is a matter of appellate policy, not a binding legal doctrine. Because the law-of-the-case doctrine is discretionary, it need not be applied when the lower court's decision is "clearly erroneous and would work a manifest injustice." Id. at n.* (citing *United States v. Williams*, 41 M.J. 134, 135 n.2 (C.M.A. 1994)).

In the present case, it would be inappropriate to apply the law-of-the-case doctrine. With respect to the first prong of *Doss*, the ruling of the court below was clearly erroneous. As noted in *Penister*, the military judge has broad discretion to "err on the side of caution" in deciding whether to accept a plea. 25 M.J. at 152. Here, when the military judge perceived that Appellant was not prepared to agree that his actions satisfied an element of the offense, he was well within his discretion in deciding not to accept the plea.

Contrary to the suggestion of the court below that the military judge's action had the effect of "cutting off further inquiry," *Parker*, 60 M.J. at 669, the military judge did not interrupt Appellant or counsel, nor did he move directly to enter a plea. Once the military judge said that he could not accept the plea in light of Appellant's responses, he called a recess. After the recess, the military judge asked Appellant if he needed additional time to consult with counsel. He then granted defense counsel's motion for an extended continuance. These steps provided Appellant with ample opportunity-

-if he was prepared to plead providently--to request that the military judge reopen the plea inquiry, but no such request was forthcoming.

We also note that the lower court: (1) failed to conduct a plain error review even though Appellant did not object to the ruling on providence at trial, see *United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998); (2) applied an incorrect de novo standard of review rather than determining whether the military judge's decision was arbitrary under *Penister*; and (3) improperly conducted a legal sufficiency analysis in lieu of considering whether the military judge had a reasonable basis for concluding that Appellant had not conceded the elements pertaining to actual knowledge of an official deployment decision. See *United States v. Hardeman*, 59 M.J. 389, 392 (C.A.A.F. 2004).

With respect to the manifest injustice prong of *Doss*, we focus on the specific context of this case. We first consider whether the Government had an incentive to appeal, and we then consider the relationship of the remedy sought to the circumstances of the case.

In the present case, the Government had little incentive to appeal the erroneous aspects of the lower court's decision. The Government emerged from the proceedings below with a conviction for a closely related offense--missing movement by neglect--and all of the adjudged sentence except for fourteen days of confinement, a period that Appellant had already served. If we were to apply the law-of-the-case doctrine here,

we would be sending the Government a message that an appeal should be lodged in every case where the lower court has articulated an incorrect legal standard--no matter how incidental the error from the Government's perspective, and no matter how insignificant the result--lest the Government be precluded from noting that error in the event the defense should appeal. Given the discretionary nature of the law-of-the-case doctrine, we decline to apply it in a manner that would be so contrary to the sound administration of justice.

Applying the law-of-the-case doctrine would be manifestly unjust under the circumstances of the present appeal. First, we note that the military judge correctly advised the parties that the pretrial agreement no longer was in effect. The parties agreed on the record, recognizing that the plain text of the agreement supported the military judge's position.

Second, we take into account Appellant's express request that the convening authority not grant the relief he now seeks. In contrast to the court below, *Parker*, 60 M.J. at 670, our focus here is not on whether Appellant withdrew from the agreement, but whether we should exercise our discretion in applying the law of the case to provide Appellant with the relief that he repeatedly and expressly rejected. Appellant specifically requested a sentence at trial that included a bad-conduct discharge, even though he was informed of the adverse consequences of a punitive separation. The military judge granted his request. After trial, defense counsel referenced the pretrial agreement and--expressly and

emphatically--stated that Appellant did not want the convening authority to suspend the adjudged bad-conduct discharge. After the convening authority granted clemency on confinement, Appellant made a further submission, reiterating his desire for an unsuspended bad-conduct discharge. The convening authority granted his request.

Appellant now contends that we should disregard his post-trial requests for an unsuspended discharge because they were the product of an adverse tactical situation created by the loss of his pretrial agreement when the military judge rejected his plea. Appellant suggests that in the face of an adjudged sentence to five months of confinement, as opposed to the thirty days of confinement provided for in the pretrial agreement, the defense made a tactical choice. The defense implies that Appellant chose to not request a suspended punitive discharge in order to focus the convening authority's attention on the issue of confinement.

The record expressly refutes Appellant's suggestion that Appellant's request for a punitive discharge was the product of a tactical decision. Six months prior to the convening authority's action on the sentence, the convening authority ordered Appellant's release from confinement, and remitted the balance of the adjudged sentence to confinement. A month prior to the convening authority's action--when confinement was no longer at issue--defense counsel made a further submission to the convening authority reiterating in capital letters that "Appellant does NOT desire that his

Bad Conduct Discharge be suspended." At that point, only the discharge was at issue, so there was no tactical reason for Appellant to insist that the convening authority disregard the pretrial agreement's provision for suspension of a punitive discharge. The defense submission, however, unequivocally stated that "the defense has no request for clemency."

This case does not involve a claim that these choices were the product of ineffective assistance of counsel or that these choices were not made voluntarily by Appellant. See *Pilkington*, 51 M.J. at 416. The military judge's decision did not make it necessary for Appellant to take the unusual step of requesting that his sentence include a punitive discharge. More important, the plea decision did not preclude Appellant from asking the convening authority to provide the relief set forth in the pretrial agreement by suspending the punitive discharge, particularly after his release from confinement.

Applying *Doss*, we decline to apply the law-of-the-case doctrine where the Government had little incentive to appeal, where the decision of the court below was clearly erroneous, and where reliance on the doctrine would permit Appellant to benefit from that erroneous ruling and require a convening authority to provide Appellant with the very relief that he had rejected on numerous occasions.

The pretrial agreement between Appellant and the convening authority expressly provided that the convening authority could withdraw from the agreement

if Appellant's plea did not remain in effect "for any reason." The military judge ruled that Appellant's plea was improvident, a ruling well within the range of his discretion. Under these circumstances, the convening authority acted within the terms of agreement when he withdrew from it. Appellant is not entitled to enforcement of the agreement.

III. DECISION

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

DISSENTBY: Charles E. Erdmann

DISSENT: ERDMANN, Judge, with whom GIERKE, Chief Judge, joins (dissenting):

The majority opinion finds that the United States Navy-Marine Corps Court of Criminal Appeals erred in reversing the military judge's decision to reject Parker's guilty plea to the charge of missing a movement by neglect. The majority goes on to find that Parker was not entitled to the benefit of his pretrial agreement because he specifically requested an unsuspended bad-conduct discharge.[1] Because I find that the lower court's ruling

---

[1] I am unsure why the majority reaches this issue based on their conclusion that the military judge did not err in rejecting Parker's plea. If, as the majority finds, the plea was properly rejected and there is no pretrial agreement in existence, then there is nothing for Parker to enforce.

is the law of the case and that Parker is entitled to the benefit of his bargain, I respectfully dissent.

BACKGROUND

This issue arose when Parker attempted to plead guilty pursuant to a pretrial agreement. Under the pretrial agreement, the convening authority agreed to suspend any bad-conduct discharge and any confinement in excess of thirty days. After questioning Parker during the providence inquiry, as required by Rule for Courts-Martial (R.C.M.) 910 and *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247 (1969), the military judge rejected Parker's plea because he found insufficient direct evidence of Parker's actual knowledge concerning the movement to satisfy the requirements of a missing movement charge under Article 87, Uniform Code of Military Justice, 10 U.S.C. § 887 (2000). The court then granted the defense's request for a continuance. During the intervening period, the Government withdrew from the pretrial agreement thereby rendering the agreement and its terms void. When the case went back to trial, there was no pretrial agreement in effect.

At trial Parker took the stand and gave the same testimony he had given when questioned during the initial providence inquiry. Trial counsel argued during his closing argument that Parker's actual knowledge of

---

As it is unnecessary to the majority's decision, any discussion in the majority opinion about a pretrial agreement is dicta.

the movement could be proven by circumstantial evidence, including Parker's testimony that the upcoming movement was "common knowledge" throughout his unit. Ironically, the military judge then found Parker guilty of the greater offense (missing movement by design) based on the same evidence that he found insufficient during the plea inquiry to establish a lesser included offense (missing movement by neglect). Parker was sentenced to a bad-conduct discharge and five months of confinement.

On appeal, the Court of Criminal Appeals found that the military judge erred in refusing to accept Parker's plea. The lower court held, in reliance on *United States v. Penister*, 25 M.J. 148 (C.M.A. 1987), that "the military judge's erroneous rejection of the guilty plea was not a 'failure of the accused' to fulfill any material promise or condition in the agreement." *United States v. Parker*, 60 M.J. 666, 669 (N.M. Ct. Crim. App. 2004). Therefore, R.C.M. 705(d)(4)(B) did not allow the convening authority to withdraw from the pretrial agreement. Despite this ruling, the lower court declined to return Parker to his original position under the pretrial agreement. The court concluded that Parker's subsequent request in his unsworn statement and in post-trial filings for an unsuspended bad-conduct discharge "was tantamount to withdrawal from that specific provision of the original pretrial agreement, or in the alternative, at least constituted a request to modify that term of the agreement." *Id.* at 670.

Parker petitioned this court for review of the lower

court's refusal to grant the remedy he sought. The Government did not certify any issues for appeal. In particular, the Government did not certify an issue concerning the lower court's conclusion that the military judge erred by rejecting Parker's guilty plea. We granted review of Parker's assigned issue as to whether he should have received the benefit of his pretrial agreement once the Court of Criminal Appeals found error by the military judge. The majority opinion now overturns the Court of Criminal Appeals' decision based upon its conclusion that the lower court erred when it held that the military judge erroneously rejected Parker's plea--an issue that was not properly raised before this court.

DISCUSSION

I. Error By The Military Judge and The Law of The Case Doctrine

The majority finds that the Court of Criminal Appeal's decision that the military judge erred was clearly erroneous because the military judge was "well within his discretion in deciding not to accept the plea." As noted by the majority, the Government did not appeal the ruling of the court below. We have previously held that where the correctness of a ruling by the Court of Criminal Appeals has not been challenged by the appellant or by certification by the Judge Advocate General (TJAG), "we will treat it as the law of the case." *United States v. Grooters*, 39 M.J. 269, 272-73 (C.M.A. 1994). The ruling of the lower court becomes binding on

the parties. *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986). The ruling will not be reconsidered by this court unless "the lower court's decision is 'clearly erroneous and would work a manifest injustice' if the parties were bound by it." *United States v. Doss*, 57 M.J. 182, 185 n.* (C.A.A.F. 2002).

The majority states that since the law-of-the-case doctrine is a discretionary doctrine, they will decline to apply it when that application would be contrary to the sound administration of justice. As noted, prior to this decision, the standard for applying the law-of-the-case doctrine was whether it was "clearly erroneous and would work a manifest injustice." *Id.* In reaching this finding the majority seemingly abandons that standard and fails to recognize that establishing manifest injustice is a heavy burden and can only be proven in the most unusual of cases. See, e.g., *United States v. Moran*, 393 F.3d 1, 8 (1st Cir. 2004) ("A litigant seeking to fit within the confines [of the manifest injustice exception] must negotiate a steep uphill climb."); *Ellis v. United States*, 313 F.3d 636, 648 (1st Cir. 2002) ("A finding of manifest injustice requires a definite and firm conviction that a prior ruling on a material matter is unreasonable or obviously wrong."). It is difficult to find manifest injustice where the proper remedy[2] places the Government and Parker in exactly the same position they had voluntarily agreed to prior to the military

---

[2] Recognizing the Court of Criminal Appeal's reversal of the military judge as the "law-of-the-case", then reinstating the pretrial agreement is the proper remedy.

judge's rejection of the plea.

Contrary to the conclusion of the majority, there is no manifest injustice here. The Government had every opportunity to certify the Court of Criminal Appeals' finding of error by the military judge as an issue for appeal. Counsel for the Government admitted at oral argument that the Government made a conscious decision not to certify this issue for appeal.

In addition, the Government first signaled its intent to argue that the military judge erred in a citation of supplemental authority submitted only five days prior to oral argument.[3] The Government, fully aware of this potential issue, made the conscious decision not to appeal the lower court's decision and failed even to raise the issue in its briefs.[4] These last minute tactics

---

[3] On October 6, 2005 the Government, for the first time, submitted authority consisting of four cases which addressed the law-of-the-case doctrine and stated that the "Government will address the cases above, and will argue that this Court is not bound by the NMCCA's decision that the military judge abused his discretion by rejecting appellant's plea of guilty to missing a movement." Submission of additional authority is appropriate to direct the court's attention to authority relevant to granted issues, not to introduce new appellate issues.

[4] The majority opinion exaggerates the lack of an incentive for the Government to appeal as the Government has certified issues for appeal to this court

effectively blindsided both the opposing party and the court.

As the Government made a tactical decision to defend against Parker's claims rather than certifying any of its own, the decision of the Court of Criminal Appeals to overturn the military judge's refusal to accept Parker's plea is the law of the case. See *United States v. Simmons*, 59 M.J. 485, 488 (C.A.A.F. 2004) (finding no manifest injustice where the Government did not certify any challenge to the Court of Criminal Appeals' ruling); *United States v. Kreutzer*, 61 M.J. 293, 295 n.2 (C.A.A.F. 2005) (noting that lower court's ruling is the law of the case where the TJAG has the opportunity to bring the lower court's ruling before this court and chooses not to do so). By adopting "contrary to the sound administration of justice" and "lack of incentive" standards and finding that the law of the case doctrine does not apply in this case, the majority has significantly altered, if not eliminated, that doctrine and the "manifest injustice" standard from our jurisprudence. The new standard opens the door for the Government, at the last stages of the appellate process, to raise issues that the appellant and this court had thought were resolved at the lower court. This is not a result that I can accept or

---

in cases where they have prevailed at the lower court. See *United States v. Long*, 61 M.J. 326 (C.A.A.F. 2005) (certificate for review filed). Moreover, by adopting a subjective "lack of incentive" standard, the majority removes any incentive the Government might have in the future to appeal or certify an issue for review in a timely manner.

endorse.

II. Alternate Solution

Rather than eviscerate the law-of-the-case doctrine, a better approach is to address the underlying rule of procedure to ensure that both parties have the opportunity to appropriately raise pertinent issues in a timely manner. Consideration should be given to revising C.A.A.F. R. 19(b).[5] Under C.A.A.F. R. 19(b), the Government has thirty days in which to certify an issue to this court while under C.A.A.F. R. 19(a), an appellant has sixty days in which to petition for a grant of review. In many cases a judgment or order may be favorable to the Government on one claim or issue and unfavorable on another. To avoid further litigation the Government may be content to accept the favorable portion of the ruling and live with the unfavorable portion. If this court subsequently grants one or more of an appellant's issues, the government is not allowed to raise new issues unless the lower court's decision is "clearly erroneous and would work a manifest injustice" if the parties were bound to it. *Doss*, 57 M.J. at 185 n.*.

If the Government were provided with the right to essentially cross-appeal from granted issues, Government counsel would not need to peremptorily certify issues in split decision cases to protect itself

---

[5] United States Court of Appeals for the Armed Forces, Rules of Practice and Procedure (as amended through October 1, 2004).

against a possible appeal by the defendant. I therefore recommend that C.A.A.F. R. 19(b) be revised to allow that a certificate for review shall be filed with the court no later than thirty days from the date of the decision of the Court of Criminal Appeals or thirty days from the date on which this court grants review of an issue raised by an appellant, whichever is later.

III. Remedy

Although I conclude that the Court of Criminal Appeals' ruling on the military judge's error is the law of the case, I do not accept the lower court's legal conclusion that no remedy is required. Parker initially agreed to plead guilty to unauthorized absence (AWOL) and missing a movement by neglect. In return the convening authority agreed to suspend any confinement over thirty days and any punitive discharge. When the military judge rejected Parker's guilty plea to the missing movement charge, the Government withdrew from the pretrial agreement and it no longer had any effect. Parker was tried on the missing a movement by design charge and found guilty. At sentencing, with no protection from a pretrial agreement, Parker attempted to trade a punitive discharge for less time in confinement. He was sentenced to five months of confinement and a bad-conduct discharge. Before the convening authority, he again tried to trade the bad-conduct discharge for a lesser period of confinement.

Since the Court of Criminal Appeals reversed the decision of the military judge that prompted the voiding

of the pretrial agreement, Parker now asks that the agreement be reinstated and its terms enforced, including the suspension of a bad-conduct discharge. The majority stresses that after the pretrial agreement was voided, Parker asked on three occasions for a bad conduct discharge, which in the majority's view is a change of position that should be held against him. However, it is common for parties to change position in response to differing decisions from trial and appellate courts.

It defies logic to conclude that Parker, by asking for a particular punishment based on the current status of his case, modified or withdrew from a pretrial agreement that was not in existence. Parker's unsworn statement and his clemency requests were made in the context of the case at that time. He was not attempting to modify the pretrial agreement because there was no pretrial agreement to modify. He was simply doing what he thought best given the circumstances.

As the military judge erred in rejecting Parker's plea, we must put the parties back in the relative positions they held before the error was made. See *Penister*, 25 M.J. at 152-53 (reinstating pretrial agreement where convening authority withdrew from agreement based on erroneous ruling by the military judge); see also *United States v. Clayton*, 25 M.J. 888, 889 (A.C.M.R. 1988) (holding that appellant is entitled to the benefit of his pretrial agreement when the Government withdrew from the agreement based on an erroneous ruling by the military judge).

The Government made an informed decision not to appeal the Court of Criminal Appeal's ruling that the military judge erred in rejecting Parker's guilty plea and it is therefore the law of the case. The parties should be returned to the position they were in prior to that error. I would reinstate the pretrial agreement. Parker should have the opportunity to plead guilty to AWOL and missing movement by neglect and the convening authority should suspend any confinement in excess of thirty days and also suspend any punitive discharge.

Appendix B

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee,

v.

Christopher E. Parker, Appellant.

No. 05-0072/MC.

Decided April 14, 2006

Appellant's Petition for reconsideration is denied.

Appendix C

IN THE U.S. NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON D.C.

BEFORE

C.A. PRICE, M.J. SUSZAN, R.W. REDCLIFF.

UNITED STATES

v.

UNITED STATES v. Christopher E. PARKER II,
Private (E-1), U.S. Marine Corps

60 M.J. 666 (N-M.Ct. Crim. App. 2004);
2004 CCA LEXIS 191

PUBLISH
NMCCA 200102191 Decided 19 August 2004

Sentence adjudged 9 January 2001.
Military Judge: K.B. Martin.
Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding Officer, 3d Battalion, 11th Marines, 1st Marine Division (Rein), FMF, Twentynine Palms, CA.

LtCol DWIGHT H. SULLIVAN, USMCR,, Appellate Defense Counsel
Capt ROLANDO R. SANCHEZ, USMC, Appellate Defense Counsel.
LT FRANK L. GATTO, JAGC, USNR, Appellate Government Counsel.

SUSZAN, Judge:

The appellant was charged with unauthorized absence and missing movement by design in violation of Articles 86 and 87, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 887. Pursuant to a pretrial agreement, he pled guilty to unauthorized absence and, by exceptions and substitutions, to missing movement by neglect. A military judge, sitting as a special court-martial, convicted the appellant, in accordance with his pleas, of the unauthorized absence, but rejected his plea to missing movement by neglect. The convening authority then withdrew from the pretrial agreement and the Government proceeded with proof on the missing movement by design offense. After trial by military judge alone, the appellant was convicted of missing movement by design. The adjudged sentence included confinement for five months and a bad-conduct discharge. The pretrial agreement would have required suspending the bad-conduct discharge and all confinement in excess of 30 days. The convening authority approved the adjudged sentence, but remitted confinement in excess of 44 days.

We have carefully considered the record of trial, the appellant's sole assignment of error contending that the military judge improperly rejected the appellant's plea of guilty to missing movement by neglect, the Government's response, and the appellant's reply. We conclude that the military judge erred by rejecting the appellant's plea of guilty to missing movement by neglect. With this exception, the findings are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ. We reassess the sentence in our decretal paragraph.

Providence Inquiry Into Missing Movement Guilty Plea

The appellant contends that the military judge abused his discretion by rejecting his guilty plea to missing movement by neglect, in violation of Article 87, UCMJ. Specifically, the appellant asserts that the answers he gave during the providence inquiry provided an ample basis for the military judge to accept his guilty plea to missing movement through neglect. We agree.

During the providence inquiry, the military judge asked the appellant why he believed he was guilty of the offense of missing movement through neglect. In response, the appellant testified that he knew his unit was going to Okinawa and he did not return from his unauthorized absence in time to deploy with it. After

further questioning by the military judge, the appellant stated that he heard about the prospective movement through one of his noncommissioned officers (NCOs) and answered in the affirmative the military judge's question regarding whether the deployment was common knowledge within the battalion. The appellant answered additional questions acknowledging he knew his unit was scheduled to make the movement to Okinawa in early August 2000 for a period of six months. Nonetheless, the military judge rejected the appellant's plea after the following exchange:

> MJ: And you knew of the movement, the place and time because your NCOs had told you, and that was also common knowledge in the battalion?
>
> ACC: No, sir. I heard it through -- they were talking about it, sir. I just over heard it, sir.
>
> MJ: Well, how did you know they were accurate? Lots of people talk about stuff all the time and never -- so you just heard some rumors that you all might be going to Okinawa?
>
> ACC: Yes, sir.
>
> MJ: Okay. I'm not going to take his plea.

Id.

We start with the premise that the appellant has the right to offer a guilty plea, and to do so pursuant to a pretrial agreement. Art. 45, UCMJ; RULES FOR COURTS-MARTIAL 705(b)(1) and 910(a)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). In this regard we are mindful that "a provident plea of guilty is one that is knowingly, intelligently, and consciously entered and is factually accurate and legally consistent." *United States v. Watkins*, 35 M.J. 709, 712 (N.M.C.M.R. 1992)(citing *United States v. Sanders*, 33 M.J. 1026 (N.M.C.M.R. 1991)). Furthermore, "the accused must be convinced of, and able to describe all the facts necessary to establish **[***5]** guilt." R.C.M. 910(e), Discussion. A factual basis is required for a military judge to accept an accused's guilty plea and the military judge is required to question an accused to establish this factual basis. *United States v. Chambers*, 12 M.J. 443, 444 (C.M.A. 1982); *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247 (C.M.A. 1969); *United States v. Williamson*, 42 M.J. 613, 615 (N.M.Ct.Crim.App. 1995).

The crux of the dispute in this case is whether the appellant provided a sufficient factual basis during the providence inquiry for the military judge to conclude that the appellant had actual knowledge of the scheduled movement of his unit, a required element of proof under Article 87, UMCJ. We believe the appellant did.

The responsibility of the military judge to ensure a

guilty plea is provident is clear. We understand that there may be a natural inclination on the part of the military judge to err on the side of caution on the matter. We believe that to be the case here, where the questioning by the military judge did not focus on the appellant's knowledge of his unit's movement, so much as it did on the reliability and source of that knowledge. It is clear the military judge questioned the credibility of information the appellant relied on for notice of the prospective movement.[1] The military judge questioned the credibility of the information because it was not conveyed directly or officially to the appellant; rather, it was overheard by the appellant. It was at this point the military judge rejected the appellant's plea without further inquiry and without giving the appellant an opportunity to consult with his counsel.

In cutting off further inquiry, the military judge based his rejection of the guilty plea on his belief the appellant had used potentially unreliable information in reaching the conclusion that his unit would deploy in August 2000. This was a misapplication or misunderstanding of the law. At issue is not the reliability or source of the information conveying notice of the movement, but rather the appellant's actual knowledge of the movement. Art. 87, UCMJ; MANUAL FOR COURTS-MARTIAL, UNITED STATES, (2000 ed.), Part IV, P 11(b)(2). Reliability of the information would only be an issue if there

---

[1] The fact that the information was accurate and that the unit did deploy in early August of 2000 is not in dispute.

were some doubt that the appellant had actual knowledge. Based on his statements to the military judge, we find his admissions sufficient to manifest actual knowledge of his unit's prospective movement.

To reiterate, the appellant answered the military judge's questions by stating that he knew his unit was scheduled to make the movement to Okinawa in early August 2000, satisfying the requirement that he knew of the prospective movement of the unit under Article 87, UCMJ. In *United States v. Penister*, 25 M.J. 148 (C.M.A. 1987), our superior court held the rejection of a provident guilty plea due to a misapplication or misunderstanding of the law to be error. Here, as in *Penister*, the military judge's rejection of the appellant's provident guilty plea was error.

Convening Authority's Withdrawal From the Pretrial Agreement

In *Penister*, as in the appellant's case, the accused entered into a pretrial agreement with the convening authority and agreed to plead guilty. *Id.* Having found that the military judge committed error in rejecting the accused's plea, our superior court held that the military judge's erroneous rejection of the guilty plea was not a "failure by the accused" to fulfill any material promise or condition in the agreement; therefore, the convening authority was not at liberty to withdraw from the pretrial agreement. *Id.* at 152-53.

Withdrawal from a pretrial agreement by the convening authority is limited by the terms of R.C.M. 705(d)(4)(B), which states in pertinent part:

> The convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement, upon the failure by the accused to fulfill any material promise or condition in the agreement, when inquiry by the military judge discloses a disagreement as to a material term in the agreement, or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.

Here the appellant began the performance of his promise to plead guilty and only the military judge's rejection of the plea prevented fulfillment of this condition of the pretrial agreement. Having found the military judge's erroneous action in rejecting the guilty plea to be based on a misapplication or misunderstanding of the law, we conclude that the provisions of R.C.M. 705(d)(4)(B) would not permit withdrawal from the pretrial agreement by the convening authority. Without more, the pretrial agreement remained in effect and the convening authority was bound by its terms to suspend the bad-conduct discharge and confinement in excess of 30 days. *Penister,* 25 M.J. at 153.

Accused's Post-Trial Withdrawal from a Provision of the Pretrial Agreement

Withdrawal from a pretrial agreement by the accused is governed by R.C.M. 705(d)(4)(A), which permits "the accused [to] withdraw from a pretrial agreement at any time . . ."[2] Here, we must review the post-trial processing of the case.

After trial, the trial defense counsel submitted a clemency request on behalf of the appellant. Clemency Letter of 21 Jan 2001. In the letter, trial defense counsel makes reference to the terms of the original pretrial agreement and states, "after consulting with Pvt Parker, he does NOT desire his Bad Conduct Discharge [(BCD)] be suspended, but would request that his confinement in excess of 30 days be suspended." *Id.* The request not to suspend the BCD, while submitted with the request to suspend confinement over 30 days, was not conditioned on a cap to the confinement. *Id.* On 2 March 2001, the convening authority directed the appellant's release from confinement, and the remission of all post-trial confinement in excess of time served as of 5 March 2001. Convening Authority's Letter of 2 Mar 2001. The clemency letter was later submitted as an enclosure to trial defense counsel's reply to the staff

---

[2] There are restrictions on when an "accused may withdraw a plea of guilty or a confessional stipulation entered pursuant to a pretrial agreement," but those restrictions are inapplicable here.

judge advocate's recommendation (SJAR) in the case. Trial Defense Counsel ltr of 6 Aug 2001. In reply to the SJAR, and after the appellant had been released from confinement, the trial defense counsel reiterated that the appellant did not desire suspension of his BCD. *Id.* Both the clemency letter of 21 January 2001 and the trial defense counsel letter of 06 August 2001 were enclosures to the Addendum to the SJAR of 5 September 2001 and considered by the convening authority prior to his action of 25 September 2001. Special Court-Martial Order and Action Number 246-01 of 25 Sep 2001 at 2.

Suspension of the punitive discharge was a term of the pretrial agreement. Appellate Exhibit II. The appellant's specific request that the convening authority not suspend the BCD directly contravened this provision of the pretrial agreement. We hold that the appellant's request to contravene this provision of the pretrial agreement was tantamount to withdrawal from that specific provision of the original pretrial agreement, or in the alternative, at least constituted a request to modify that term of the agreement.

Here, the situation is akin to the one addressed by our superior court in *United States v. Pilkington*, 51 M.J. 415 (C.A.A.F. 1999). In *Pilkington,* the court was asked to decide whether the convening authority had the power to approve post-trial modifications to the original pretrial agreement. There, as in the appellant's case, the original agreement called for suspension of the punitive discharge. Further, as in

the appellant's case, the accused approached the convening authority after consulting with trial defense counsel, and requested that the discharge not be suspended. In *Pilkington,* the accused made the request seeking a cap on confinement which our superior court considered a bargained for exchange. The court did not delve into the advisability of the accused's decision, but rather looked to whether the accused was operating of his own free will by making this proposal. Having found that to be the case, our superior court concluded there was no legal error or deprivation of due process associated with the modification of the pretrial agreement. *Id.* at 416.

Here, we find the appellant's request, made with the benefit of advice from trial defense counsel, to be the product of a fully informed and considered decision.[3] As such, the convening authority had the power, per the appellant's withdrawal from or modification of the provision requiring suspension of the bad-conduct discharge in the original pretrial agreement to approve the bad-conduct discharge without suspension. We base this holding on the fact that while pretrial agreements are not subject to all the rules of conventional contract law, there is no doubt that one party to an agreement cannot avail himself of

---

[3] We note that during the presentencing phase of the trial, the appellant made an unsworn statement in which he requested a bad-conduct discharge, and advised the military judge that he had considered the advice of his attorney in making the request. Record at 72.

a default by the other party which he himself has caused. *Penister*, 25 M.J. at 153. In other words, the appellant cannot on one hand ask the convening authority to approve an unsuspended bad-conduct discharge, contrary to the terms of the pretrial agreement, and on the other hand later be allowed to successfully challenge, absent some showing of prejudice, the very action he requested. Therefore, the appellant was not denied any of his substantial rights. Arts. 59(a), 66(c), UCMJ.

Conclusion

Accordingly, only so much of the findings of guilt as to the lesser offense of missing movement through neglect in the Specification under Charge II, and Charge II, and the remaining findings of guilty under Charge I are affirmed. The sentence is reassessed and only so much of the sentence as provides for a bad-conduct discharge and confinement for 30 days is affirmed.

Senior Judge PRICE concurs.

DISSENTBY: REDCLIFF

DISSENT:

REDCLIFF, Judge (dissenting):

Finding no abuse of discretion by the military judge in rejecting the appellant's plea of guilty to missing

movement by neglect, I would affirm the findings of guilty and the adjudged sentence. In my view, the record supports the military judge's decision. Accordingly, I must respectfully dissent.

Providence Inquiry Into Missing Movement Guilty Plea

Holding that the military judge abused his discretion and misapplied the law by questioning the quality of the information relied upon by the appellant for notice of his unit's movement, the majority opinion finds that the answers the appellant gave during the providence inquiry provided a sufficient basis for the military judge to accept his guilty plea to missing movement. I disagree.

During the providence inquiry, and after thoroughly explaining the relevant elements and definitions, the military judge asked the appellant why he believed he was guilty of the offense of missing movement. In response, the appellant initially stated that he knew his unit was going to Okinawa and he did not return from his unauthorized absence in time to deploy with it. Record at 19-20. After further questioning by the military judge, the appellant stated that he heard about the prospective movement through one of his noncommissioned officers (NCOs), but then told the military judge that he simply overheard some unidentified NCOs talking about the deployment. *Id.* at 21. Upon further questioning, the appellant

conceded that he just heard rumors that his unit might be going to Okinawa. *Id.*

Based on the appellant's equivocal statements, the military judge stated his intent to reject the guilty plea. The trial defense counsel did not object to the military judge's announced intention. Nor did the trial defense counsel request time to consult further with the appellant to clarify the factual basis for the guilty plea. Moreover, trial defense counsel made no effort to dissuade the military judge or to present additional information reflecting the appellant's actual knowledge of the movement. Government counsel remained silent regarding the military judge's intention to reject the appellant's plea. Thus, the military judge rejected the appellant's guilty plea, entered a plea of not guilty on his behalf, and conducted a bench trial on this offense.

Generally, a military judge "may not arbitrarily reject a guilty plea." *United States v. Penister*, 25 M.J. 148, 152 (C.M.A. 1987). However, "[a] provident plea of guilty is one that is knowingly, intelligently, and consciously entered and is factually accurate and legally consistent." *United States v. Watkins*, 35 M.J. 709, 712 (N.M.C.M.R. 1992). Furthermore, "the accused must be convinced of, and able to describe all the facts necessary to establish guilt." RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Discussion. A factual basis is required for a military judge to accept an accused's guilty plea. *United States*

v. Chambers, 12 M.J. 443, 444 (C.M.A. 1982); *United States v. Williamson*, 42 M.J. 613, 615 (N.M.Ct.Crim.App. 1995). Moreover, a military judge is required to question an accused to establish the factual basis for a plea of guilty. *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247 (C.M.A. 1969). Our superior court has held that when addressing issues regarding the providence of guilty pleas, our inquiry is not to end "at the edge of the providence inquiry but, rather, [we shall look] to the entire record to determine whether the dictates of Article 45, R.C.M. 910, and *Care* and its progeny have been met." *United States v. Jordan*, 57 M.J. 236, 239 (C.A.A.F. 2002). It is unsettled whether such an inquiry is appropriate when reviewing the rejection of a plea deemed improvident. In considering only the providence inquiry, or in conjunction with the whole record, I find ample support for the military judge's decision to reject the appellant's plea of guilty to missing movement by neglect.[4]

The pivotal issue in this case is whether the appellant provided a sufficient factual basis during the providence inquiry for the military judge to conclude that the appellant had actual knowledge of the movement of his unit, a required element of proof

---

[4] The appellant has not challenged the factual sufficiency of the Government's evidence against him on the merits, and the record contains compelling proof that he missed movement by design, despite his assertion on the merits that he did not know about the movement.

under Article 87, UMCJ. Based on his statements to the military judge, consistent with the appellant's further testimony in his defense on the merits, I find the appellant's admissions insufficient to manifest actual knowledge of the unit's prospective movement. I rest this conclusion on the equivocal statements made by the appellant during the providence inquiry that the unit's movement was the subject of rumor, mirrored by his testimony on the merits that no one in his unit ever told him that the unit was deploying to Okinawa. According to the appellant, "It was just -- it was, like, common knowledge through the battery and I just got it from some of the people I hung out with that we were going sometime." Record at 61. Under cross-examination, the appellant further asserted that he had no knowledge that his unit was deploying and that neither of his section leaders told him they would be deploying for Okinawa in August. *Id.* at 62. Finally, reflecting his lack of knowledge, the appellant testified that he thought he'd be at one base throughout his enlistment and that he was told by his recruiter that while it was possible he might have to deploy, he probably would not have to do so. *Id.* at 60.

As noted by our superior court, substantial deference should be accorded military judges in accepting an accused service-member's guilty plea. In *Penister*, relied upon by the majority opinion, the United States Court of Appeals of the Armed Forces recognized that "a judge may err on the side caution and not accept a guilty plea when there is **any** question as to

its providence." *Penister,* 25 M.J. at 152 (emphasis added). While the *Penister* court ultimately held that the military judge acted improperly in rejecting *Penister's* guilty plea, the facts in *Penister* are distinguishable from the appellant's case. Namely, in *Penister,* it was the government counsel who initially challenged the guilty plea, ostensibly to undercut the pretrial agreement. Here, it was the military judge, *sua sponte*, who questioned the providence of the appellant's guilty plea.

In my view, the military judge did not abuse his discretion by rejecting this appellant's guilty plea. As noted by our superior court, the "abuse of discretion" standard is a strict one, defined as follows:

> To reverse for "an abuse of discretion involves far more than a difference in ... opinion... The challenged action must ... be found to be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous' in order to be invalidated on appeal."

United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987)(quoting *United States v. Glenn*, 154 U.S. App. D.C. 61, 473 F.2d 191, 196 (D.C. Cir. 871972). Simply put, "... when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993)(quoting Magruder, J., THE NEW YORK

LAW JOURNAL at 4, col.2 (March 1, 1962), *quoted in* Quote I and II: A DICTIONARY OF MEMORABLE LEGAL QUOTATIONS 2 (1988)). Although the military judge might have solicited further probing questions from both the government counsel and the trial defense counsel to resolve concerns about the providence of the appellant's pleas, he was not required to do so. And furthermore, such efforts would have likely proven fruitless given the appellant's testimony on the merits. During the providence inquiry, the appellant clearly "hedged" his responses to the military judge. Later, the appellant undertook significant effort to refute the government's proof that he was present when "word" was passed about the unit's prospective movement. Thus, I find it difficult to conclude, as the majority does, that the military judge committed clear error here.

If military judges are to act as something more than "rubber stamps" in conducting their providence inquiries, we ought to afford them considerable deference in conducting their inquiry and rendering judgment. Oftentimes, a person's facial gestures, body posture, or voice inflection may give a military judge pause to question the validity of that accused's statements.[5] Until a military judge is personally satisfied with the factual basis for an accused's guilty plea, such a plea should be rejected, not only for the benefit of a recalcitrant accused, but also for the integrity of the military justice system. In evaluating the appellant's

---

[5] Although such observations should be expressed on the record to aid in review of an otherwise inanimate record of trial, failure to do so is not error.

providence inquiry in this instance, I firmly believe the military judge properly exercised his discretion and did not arbitrarily reject the appellant's proffered guilty plea.

As I would not sustain a conviction for violation of Article 87 based solely on rumor, innuendo, or impression drawn from reliance on "some people the appellant hung out with," I cannot agree that the military judge abused his authority in rejecting the appellant's plea of guilty on the same basis.[6]

For the Court
R.H. TROIDL
Clerk of Court

---

[6] Finding no abuse of discretion by the military judge in rejecting the appellant's guilty plea to missing movement, I express no view regarding the majority's enforcement of the pretrial agreement or in its conclusion that the appellant effectively withdrew from one of its provisions.